FILE COPY

FEB 16 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1931.

No. 430.

In the Matter

of

The Petition of SPENCER KELLOGG & SONS, INC., as owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime,

SPENCER KELLOGG & SONS, INC.,

Petitioner,

HILDA M. HICKS, as Administratrix, and others,

Claimants-Respondents.

PETITIONER'S REPLY BRIEF.

D. ROGER ENGLAR,
CHAUNCEY I. CLARK,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Counsel for Petitioner,
Spencer Kellogg & Sons, Inc.

INDEX.

	PAGE
I—The petitioner's right to a limitation of its liability	2
(a) Petitioner's Method of Operating the "Linseed King"	3
(b) Ice Conditions Prior to the Disaster	6
(c) The Alleged Overcrowding	6
(d) The Alleged Insufficiency of the Crew	10
II—The status of the so-called "Saturday men" from the standpoint of the New Jersey Workmen's Compensation Act	10
Conclusion	13
Appendix A—Analysis of the Opinion of the District Court, and of the evidence on the subject of ice conditions prior to the day of the accident	i

TABLE OF CASES CITED:

The Virginia (*Hines* v. *Butler*), 264 Fed. 986, aff'd 278 Fed. 877	2, 3
Hartford Accident & Indemnity Co. v. *Southern Pacific Co.*, 273 U. S. 207	13

IN THE

Supreme Court of the United States

OCTOBER TERM—1931.

No. 430.

In the Matter

of

The Petition of SPENCER KELLOGG & SONS, INC., as owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime,

SPENCER KELLOGG & SONS, INC.,
Petitioner,

HILDA M. HICKS, as Administratrix, and others,
Claimants-Respondents.

PETITIONER'S REPLY BRIEF.

Four briefs have been served on behalf of respondents herein, namely, a brief on behalf of May A. Amlaw, a brief on behalf of Millicent Ifill, Darnley Barker and Kenneth Norgrove; a brief on behalf of the respondents Roberts and Sims; and a brief on behalf of the respondent Hilda M. Hicks. The present is intended as a reply to all of these briefs.

I.

The petitioner's right to a limitation of its liability.

Most of the authorities cited by the respondents require no discussion, as they merely state and apply principles about which there is no dispute.

The respondents apparently rely very strongly on the case of *The Virginia* (*Hines* v. *Butler*), 264 Fed. 986, aff'd 278 Fed. 877; because it involved a vessel making short voyages on inland waters. An examination of that case will show that it does not aid the respondents. It is true that the petitioner in that case was denied a limitation in respect of the claims of passengers, owing to the fact that he had failed to comply with a number of specific statutory requirements designed for the protection of passengers. In the case of cargo, however, there was no violation of any specific statutory duty and accordingly, although it was found that the petitioner had been negligent, he was allowed to limit his liability. The conclusion of the District Court, which was accepted by the Circuit Court of Appeals, is stated in the last paragraph of its opinion, which reads as follows:

> "After much consideration, and a great deal of hesitation, I have concluded that the negligence of the petitioners does not amount to privity or knowledge, within the meaning of those words as used in Section 4283. The conclusion of the whole matter is that they may limit their liability as against cargo claimants, but not as against the claims of passengers or their dependents for deaths, personal injuries, or baggage" (264 Fed., at p. 997).

In the present case the only fault with which the Circuit Court of Appeals charged this petitioner, consisted in the petitioner's reliance on a competent subordinate to carry out his instructions. Until the present case, such reliance has never been held to be negligence; but, even if it were, the petitioner would still be entitled to a limitation of liability under the rule laid down in *The Virginia,* upon which the respondents rely.

The brief filed on behalf of Hilda M. Hicks seems to overlook entirely the distinction between liability and the right to a limitation. The middle paragraph on page 8 of that brief states a hypothetical case in which it is argued that an application for a limitation of liability would be absurd. On the contrary, we think that on the facts there stated the right to a limitation would be perfectly clear.

(a) *Petitioner's Method of Operating the "Linseed King".*

The brief filed on behalf of respondents Roberts and Sims (pp. 2, 3) quotes a number of isolated passages from the testimony of Stover, from which it is argued that he expected the boat to be run when there was ice in the river. This argument is contrary to the concurrent findings of the lower courts, and is quite contrary to the evidence of Stover himself. The manner in which the launch was operated is explained in our principal brief (pp. 16-17). After ice had once appeared the boat was only run in the day time when the river was clear. The fact that ice had once appeared would not necessarily result in her being laid up for the winter, as the river might clear up and the conditions might be such that it was perfectly safe

to run in the daylight hours. We quote as follows from the testimony of Stover, relating to the previous year (R. 740-1):

> "Q. What did you do with her after January 2nd? A. Kept her in the slip, and made daylight trips until the last part of the month, when the river was clear.
>
> Q. The last of January? A. Yes, sir.
>
> Q. Then you really did not lay her up on January 2nd? A. I did not say we laid her up. I said we discontinued making the regular trips that time."
>
> * * * * * * *
>
> "Q. You had had ice before that, hadn't you, before January 2nd, 1925? A. Not that I remember.
>
> Q. If there had been ice you would have laid her up? A. We would not have run her in the ice.
>
> Q. Then you recognized this boat was not equipped to run in the ice, is that it? A. I do not know as to that, but I know my instructions were to not run her in the ice. Therefore I was not going to do it."

It is clear from Stover's testimony, taken in its entirety, that he would order the boat to discontinue making regular trips, as soon as he had personally learned that there was ice in the river. If no other precautions had been taken, Stover might have been bound, at his peril, to keep himself informed of ice conditions. The question of running in ice, however, was not left to Stover's general supervision. The master had definite and positive instructions not to run in ice. That such instructions had been given and were widely known,

appears in the testimony of the respondents' own witnesses (see our Principal Brief, p. 16). There is no suggestion in the record that these orders were not given in good faith, or that they had ever been disobeyed with Stover's knowledge. In their argument the respondents ignore the specific orders to the master, and refer only to the general supervision by Stover, as though this general supervision were the only precaution which the petitioner had taken. For this reason their argument gives a wholly erroneous impression. The matter of running in ice was not left to Stover, but was covered by specific instructions from the petitioner's home office in Buffalo. These instructions had been given by the petitioner to Stover, and by Stover to Rohweder, the master of the boat.

The petitioner had been maintaining a ferry service for its employees for some ten years. This service was inspected about every six weeks by a representative from the home office in Buffalo, who had made a study of safety in plant operation (Aldrich, R. 555 to 559). The regulations for the operation of the boat were specific, and as far as appears they had been strictly obeyed. Certainly no representative of the petitioner had any reason to believe that there had been or would be any violation of these regulations (R. 561, 1915, 1916).

The Circuit Court of Appeals specifically found that no ice was to be seen opposite the petitioner's plant on Sunday, and that "at sundown there was no reason to believe that the river was not clear at that point, though there was much ice not many miles above, with knowledge of which Stover was chargeable" (R. 2369). Granting that Stover should have known that there was ice further up the Hudson River, what was his duty? He had already given definite and positive instructions that the

boat was not to be run if ice appeared in the river. If he could not rely on these instructions, what more should he have done? The Circuit Court of Appeals suggests that he was bound to accompany the boat himself. To say that he was bound to do this is to nullify the Limitation Act as heretofore interpreted.

(b) *Ice Conditions Prior to the Disaster.*

The findings of the Circuit Court of Appeals as to ice conditions prior to the day of the disaster are entirely consistent with petitioner's theory of the case. The claimants, however, seek to reestablish in this Court the erroneous findings of the District Court on this subject. In the appendix to the Amlaw brief, there is contained a list of witnesses whose testimony is apparently cited in support of the proposition that there was ice in the river for a week or more prior to the disaster. Under these circumstances we deem it necessary to attach hereto, as Appendix A, a discussion of the opinion of the District Court, together with an analysis of the evidence on the subject of ice conditions. This appendix will afford a ready reference to the testimony in the event this Court should deem it necessary to examine the evidence on this issue.

(c) *The Alleged Overcrowding.*

The figure of 63 square feet referred to in the brief filed on behalf of May A. Amlaw (p. 2; Appendix, p. iii) is a purely arbitrary figure arrived at after making numerous deductions, which were explained by Mr. Barrett, the witness who prepared the plan of the boat (R. 1837 to 1840). He repeatedly made it clear that he was making these deductions only because counsel

for the claimants (respondents here) embodied them in questions which he was required to answer merely as a mathematician. This is the explanation of the so-called "discrepancy" referred to in the Amlaw brief (Appendix, p. vi). We referred to this method of examination in our principal brief (p. 73). As the witness Barrett said (R. 709),

> "That is according to your figures, not my figures."

The trial court finally sustained an objection to this method of examination, which consisted merely of stating certain facts to the witness and asking him to make simple mathematical computations based thereon (R. 710).

Petitioner's Exhibit 10, referred to in the May A. Amlaw brief, at page 22, requires some explanation. There were 81 men in the boat at the time this picture was taken; and they were all in the cabin, as distinguished from the pilot house. The captain's position in the pilot house is marked in ink on Exhibit 10, and it is vacant. On the morning of the disaster there were not over 70 men in the position occupied by the 81 men shown in Exhibit 10 (see our Principal Brief, p. 64). In other words, Exhibit 10 shows 11 more men in the cabin space than were in that space on the morning of the disaster. Of course, a crowd of men looked at from the side and from a distance will always look dense; but, nevertheless, we think it is clear even from Exhibit 10 that if 11 of the men there shown were taken out of the boat, she would not be greatly crowded. The uncontradicted evidence shows that 96 men could be crowded into the space occupied by the men shown in Exhibit 10 (R. 613-14). This demonstrates that the space in

question could not be greatly crowded with the 81 men shown in Exhibit 10; and that it would be no more then comfortably filled with the 70 men who actually occupied it on the morning of the disaster.

The absence of the cabin and pilot house does not affect in any way the number of men who could sit or stand in the boat (R. 676-7). Respondents' argument that the presence of the cabin and pilot house would cut down the carrying capacity of the launch by 10% is a clear misconstruction of the evidence to which they refer. What the witness Dinkel actually said was:

> "'Before the pilothouse was put on the "Linseed King", I had seen 100 men crowded into her cabin.
>
> * * * * * * * *
>
> When the new pilothouse was put on the "Linseed King" it cut down her carrying capacity because a large part of the space toward the bow was taken up by the pilothouse, and the space allowed for the captain. I should say that pilothouse would cut down her carrying capacity by about 10 men.' Is that right? A. About 10 men.
>
> Q. It is true you carried 100 men, isn't it? A. Alongside of the pier, as I explained to you before, and I ordered the men off" (R. 1809).

What the witness testified was that on the occasion when there were 100 men on the boat, 10 of them occupied the space which was later made into the pilothouse, *i. e.*, the space where the captain and some 3 or 4 other men were standing on the morning of the disaster. From this testimony it follows that the witness had seen 90 men crowded into the space where, at the time of accident, there were only 70. Incidentally, his testimony shows

that on this earlier occasion when there were 100 men on the boat, they went on voluntarily, indicating that they were not subjected to any serious discomfort; and that the witness ordered them off because he thought the number too large for safety.

The testimony of Barrett quoted on page 23 of the Amlaw brief merely shows that the witness was able to put 81 men in a space where there were only 75 at the time of the disaster, and still give each of them 2 square feet of space—the amount which respondents' expert, Rietzke, and petitioner's expert, Barrett, both testified was a safe allowance. (R. 1407, 700).

Mr. Charlton's testimony that he had "never seen a condition like that quite" (Amlaw Brief, Appendix, p. iii) did not refer to Exhibit 10, but to the previous question as to whether he would permit a boat "to be so crowded with human persons that they were squeezed tight to each other's elbows and shoulders". A picture (which may or may not have been Exhibit 10) was first shown to him after he had given this answer (R. 871).

The witness, Crocker, did not testify that any particular amount of space was allowed to each passenger on city ferryboats, but testified, on the contrary, that there was no particular limit to the number of passengers carried. This witness nowhere expressed an opinion as to the number of men that could be carried on the "Linseed King"; and merely stated that he could not crowd passengers on the city ferry boats so that they would each have only 2 square feet. This may be conceded; for passengers on the "Linseed King" each had more than 3 square feet of space inside the cabin and pilothouse, and nearly 5 square feet altogether.

We deem it unnecessary to discuss the evidence as to the number of men on board the "Linseed King" at the

time of the disaster, in view of the concurrent findings of the lower courts as to this fact.

We deem it unnecessary, also, to discuss the cases cited by the respondents, in which passengers have been injured by overcrowding. In the present case it is clear that the men on the "Linseed King" were not so crowded as to cause them any injury.

(d) *The Alleged Insufficiency of the Crew.*

As indicated in our principal brief, we think there is no substance in the charge that the "Linseed King" was undermanned. However, in answer to the arguments contained in the briefs filed by some of the respondents, we call attention to the opinion of the Circuit Court of Appeals (R. 2366). After stating that Rohweder was in charge of the launch, the court said:

> "In Manhattan there joined him a chauffeur, named Roberts, detailed to give him general assistance, whom we may consider as a deckhand."

II.

The status of the so-called "Saturday men" from the standpoint of the New Jersey Workmen's Compensation Act.

The respondents stress the fact that the men who were on the "Linseed King" pursuant to orders received on the previous day were not employed until they got over to the New Jersey side. This fact is undisputed, provided it is properly understood. It is true that the contract of employment was made on the New Jersey side; otherwise the New Jersey Workmen's Compensation Act could not govern the case. The contract of employ-

ment, however, was made on the Saturday preceding the accident. That is when the men were engaged. The testimony of McHale is fully discussed in our principal brief (Appendix C, pp. iv to vi). The testimony of Stover (mentioned in the Amlaw Brief, p. 33) is quite correct provided it is properly understood as relating to the first occasion when the men came to Edgewater and were engaged. The respondents seek to construe this testimony as relating to the morning of the disaster, but it clearly will not bear that construction.

Respondents suggest that the arrangement with these men was nothing but a general arrangement that they would be employed as soon as work was available. This is not the case. They were engaged specifically to work on the cargo of the "Tercero"; and their work was contingent only on her arrival. She had arrived and started discharging on Sunday, and these men would have gone to work immediately on reaching the plant Monday morning. They would have had a right to go to work pursuant to a definite contract of employment; for the work which they had been engaged to do was then ready for them. It is not necessary in this case to decide what the rights of these men would have been if they had been injured while they were returning from the petitioner's plant on Saturday or Sunday, after they had been definitely engaged to work on the "Tercero" cargo. We respectfully submit, however, that even at that time they would have had a right to compensation; for they had been definitely employed and, although they had not yet begun work, they were travelling on the "Linseed King" pursuant to their contract of employment. However this may be, we think it is clear that if these men had demanded relief under the New Jersey Workmen's Compensation Act, in respect of injuries

sustained in the disaster on the morning of December 20th, they would have had a clear right to the relief sought.* They were then proceeding immediately to work pursuant to a contract of employment, on a vehicle furnished by the employer for that purpose. The employer would have had no chance whatever of evading payment of compensation. The rule under which these men would have recovered compensation under such circumstances is a sound, remedial rule; but it is a rule which should work both ways.

On the question whether the contract of employment was maritime, we can add little to what we said in our principal brief. This Court will undoubtedly recognize that the receipt of a full cargo of linseed involves a great deal more than merely getting it from the hold of the ship to the adjacent side of the pier. It is obvious that all of the men employed to handle this cargo would not work on the vessel herself. We referred in our principal brief (pp. 59-60) to the testimony of McHale that the extra men would be employed generally on the pier and in the plant, as well as on the ship. Not only is this testimony uncontradicted; its truth is plain from the very nature of the task. Accordingly, the question whether any one of these men would have been engaged in a maritime employment is a matter of mere speculation.

We take the liberty of stating, in this connection, that, even if the compensation act is not applicable, it is a matter of great importance to this petitioner whether it is inapplicable because there was no contract of employment, or because the contract of employment was maritime. We submit also that these are questions which must be dealt with as to each claimant individually. The pleadings and the evidence differ, and the

*Counsel for respondent Hilda M. Hicks apparently recognize this fact; see naive statement on pages 15 and 16 of their brief.

claimants cannot be dealt with merely as a class. In all but three cases the pleadings, the evidence or the absence of evidence, require a decision in favor of the petitioner, on these issues (see our Principal Brief, Appendices C and D, pp. viii, xii and xiii).

We deem it unnecessary to discuss the case of *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.* (273 U. S. 207), upon which the respondents lay so much stress. That case has no bearing on any issue in the present case excepting the issue as to whether the employees should receive workmen's compensation in this Court or before the Compensation Bureau. This is a question which we do not think it necessary to argue (see Respondent's Brief in No. 444, pp. 11, 12).

Conclusion.

In closing we wish to emphasize the fact that *on her way over from Edgewater to New York, before taking any passengers on board, the "Linseed King" was run through ice which made it necessary for her to slow down* (R. 123, 2366, 322-23, 372-3). For the master of the boat to press through this ice was a distinct violation of the definite and specific orders which he had received from the petitioner; and his violation of these orders, as found by both of the lower courts, was the proximate cause of the disaster. Respondents seek to divert attention from this fact by suggesting various hypothetical cases in which they argue that the precautions taken by the petitioner might have been inadequate. We submit that such speculation can have no weight in the present case. The fact is that petitioner had maintained a ferry service for some ten years; and throughout that period the precautions which it had taken had proven sufficient. They would have been en-

tirely adequate in the present case if their definite and specific instructions had been obeyed, as they had every right to expect. These facts are established by the uncontradicted evidence and by the concurrent findings of both the lower courts. We submit that they establish a clear and typical case for limitation of liability.

In the present case the petitioner sought the protection of two remedial statutes, both of which were evidently intended to apply precisely to this type of case. The Federal Act for the Limitation of Shipowners' Liability has been held wholly inapplicable; and the New Jersey Workmen's Compensation Statute has been held inapplicable to a large number of men who unquestionably were, in the ordinary sense, employees. We submit that the decision in this case illustrates the reluctance of the courts to apply remedial statutes in any case where this will result in the denial of damages to a large number of people, arising out of a major catastrophe. Plainly, however, it is just this sort of case in which remedial statutes are important, and we submit that their scope should not be whittled down by any narrow and technical construction. As has so often been said, hard cases make bad law. We submit that both of the statutes involved in this case have been narrowly and technically construed in the lower courts; and that their decisions are erroneous, and should be reversed.

February 15, 1932, New York City.

Respectfully submitted,

D. ROGER ENGLAR,
CHAUNCEY I. CLARK,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Counsel for Petitioner,
Spencer Kellogg & Sons, Inc.

Appendix A.

ANALYSIS OF THE OPINION OF THE DISTRICT COURT, AND OF THE EVIDENCE ON THE SUBJECT OF ICE CONDITIONS PRIOR TO THE DAY OF THE ACCIDENT.

On the question of ice conditions, the petitioner rests upon the decision of the Circuit Court of Appeals. The District Court appears to have reached the conclusion that there was ice in the river in the neighborhood of petitioner's plant for a week or more prior to the disaster. In support of its conclusion, the District Court cited 11 witnesses, all of whom were called by the claimants. Apparently it ignored the evidence offered by the petitioner, although this consisted largely of unimpeached operating records of railroads and other large corporations operating craft in New York Harbor. However, the petitioner does not complain of this, as the great weight of the claimants' testimony tends to support rather than to contradict the testimony of the petitioner. What petitioner does complain of is the fact that the District Court cites, in support of its conclusion, the testimony of witnesses who testified squarely to the contrary. It makes no difference whether the issue is decided on the testimony of the claimants' witnesses or the petitioner's witnesses; but it is essential to bear in mind what the witnesses say.

CLAIMANTS' WITNESSES:

Of the witnesses mentioned by the District Court, easily the most credible were Oliver, Quinn, Cook, Peterson and Lang.

The evidence of the witness Oliver was particularly important in view of the fact that he is the superintendent of the Cornell Steamboat Company, which engages in towing operations in the northern reaches of the Hudson River, as well as in New York Harbor, and is, therefore, very familiar with ice conditions. Indeed, he was probably the best qualified witness on this subject who was produced at the trial. In speaking of this witness, Judge Hazel said:

> "Oliver, superintendent of the Cornell Steamboat Company, testified that he encountered difficulty with ice in towing on December 4th" (R. 131)..

This difficulty was encountered between Albany and Kingston (R. 850-2). He testified as follows:

> "Q. Poughkeepsie is how far above New York?
> A. 75 miles. I left the tow at Poughkeepsie.
> Q. Did you observe anything about the ice conditions in the Hudson River below Poughkeepsie?
> A. At Poughkeepsie there seemed to be no ice to amount to anything. We had gotten out of the ice. As a matter of fact, at Kingston we had been getting out of the ice, and for that reason I put the tow into two tows, the loaded tows in one and the light tows in the other" (R. 851-2).

He also testified that, in the operation of the Cornell tugboats he relied upon the reports received from the tug captains as to ice conditions and that the first report he had received from any of his captains of ice below Fort Washington Point was on December 20th, the day of the disaster (R. 857-8, 861). His company has about 38 tugs in active operation (R. 849), and the question of ice conditions is very important to them (R. 857-8,

860). He also testified that ice conditions change very rapidly as you go up the Hudson River; that conditions even above Fort Washington Point are very often different from those in the harbor (R. 858); and that in very cold weather the ice above Fort Washington Point may freeze and not come down (R. 859). After a spell of 3 or 4 days of very cold weather, he would not look for ice down in the harbor (R. 860).

The District Court further says:

> "Quinn showed log entries of ice a few miles above Edgewater on December 18th; and Cook, manager of Dyckman Street Ferry, and Peterson saw ice 2 or 3 days before the occurrence" (R. 131).

George V. Cook, Manager of the Dyckman Street Ferry, located at 210th Street, about 5½ miles up the river from petitioner's plant, produced the records kept by him in the course of his business and testified from his records that the first ice that appeared in the river in the vicinity of his ferry was on December 19th, the day before the accident (R. 1122) and further testified definitely that he saw no ice there on Saturday, the 18th (R. 1124). The observation of ice is an important part of the duties of this witness as manager of the ferry, for the existence of ice in the river is a serious hindrance to the operation of the ferry. The testimony of this witness was most convincing and the fact that his ferry is 5½ miles above the petitioner's plant and is also above Fort Washington Point fits in exactly with the testimony of the other witnesses that there was no ice in the river in the vicinity of 96th Street until the day of the disaster (Monday) excepting the ice which came down shortly after midnight on Saturday and went back up the river again before daylight, early Sunday

morning. As the ferry is above Fort Washington Point and as the wind was westerly on Sunday (N. Y. Central Record, R. 1718-19), this would tend to hold the ice behind Fort Washington Point and prevent it from coming further down the river during that day.

Samuel Quinn, storekeeper of the Interstate Park Commission, whose office is at Alpine in the vicinity of Yonkers Ferry, produced his private diary and testified that *even at Yonkers* ice formed in the Hudson River for the first time on December 18th, 1926. He said:

> "There had been a little slush ice and soft ice along the shores but not to amount to anything, and stop navigation" (R. 917).

This fits in completely with the testimony already quoted.

Russell F. Peterson, a pilot of the Yonkers ferry, called by the claimants, corroborated fully the testimony of Quinn. He said that on the 18th a good deal of ice appeared in the river at Yonkers (R. 1074); that there was no trouble with ice before the 18th—a little floating ice that did not amount to much (R. 1075). The Yonkers ferryboats are particularly susceptible to ice damage on account of their side wheels and for this reason ice is noted as soon as it appears, and a little ice will interfere with their navigation (R. 1075).

The testimony of this witness is also quite important on the difference between ice conditions at Yonkers and in the lower Hudson. He testified as follows (R. 1076):

> "Q. In your opinion it is quite possible to have the river frozen across at Yonkers and not have ice in the North River opposite Manhattan Island, isn't that so? A. Yes, sir."

Fred Lang, who had been night operator of the "Lin-

seed King" up to the date of the disaster, but had been discharged before he gave his testimony, testified that on Sunday morning there was a little ice on the New York shore close to the slip which did not amount to anything (R. 1639, 1640) and was not dangerous (R. 1640). He testified positively that there had been no ice in the river previous to that time (R. 1639).

These five witnesses were called by the claimants, and are all cited by the District Judge in support of his opinion. In view of the fact that the petitioner also accepts their testimony as entirely truthful, and offered a large amount of additional testimony to the same effect, it would seem that there should be no possibility of dispute as to ice conditions. Nevertheless, the District Court appears to have reached a conclusion quite inconsistent with this testimony, and it, therefore, becomes necessary to analyze the entire evidence on this subject.

We will first discuss the other witnesses cited by Judge Hazel—all of whom were also called by the claimant. None of these men testified from records, as did Oliver, Quinn and Cook.

Probably the star witness for the claimants was Monte Kearney, Captain of the freight boat "Ben Franklin", who testified with reckless extravagance that for a week before the accident he saw plenty of good ice three to five inches thick all the way down to the Battery (R. 838-9); that the river was well filled with ice for a week before the accident (R. 846); that it extended from shore to shore and from 96th Street to Franklin Street (R. 846). The testimony of this witness is so extravagant and so completely disproved by the responsible witnesses for the claimants who produced reliable records on the subject, that it hardly needs further comment. As characteristic of this type of witness, he was unable to

produce his log book for the period in question, as it had been conveniently destroyed by another man just a short time before the trial (R. 844).

The District Court cites Kearney's testimony in the opinion, apparently overlooking the fact that Kearney's testimony is directly contrary to the testimony of claimants' witnesses, Oliver, Quinn, Cook, Peterson and Lang.

The two patrolmen, Lennon and O'Toole, gave testimony almost as extravagant as that of Kearney. They admitted that they were not concerned with the ice, in the line of their duty, and that they had no occasion to remember ice conditions. They had no means of refreshing their recollection and relied entirely upon their memory as to the date that ice appeared, more than a year before they testified.

Pollard said that on Saturday the 18th "I think there was some ice on the New York side of the river inshore". (R. 1244). He relied entirely upon his memory. He was only concerned with ice when it interfered with moving boats around the slip; and he could not recall whether he had any such trouble prior to December 20; there was nothing about the ice on the 18th that particularly attracted his attention (R. 1245-6).

Alfred C. Smith, pilot of the fireboat "Mitchell", testified from memory that for "two or three days before that accident, we had quite a little ice in our slips" (R. 1341-2). He did not testify to having seen any ice floating in the river.

Aaron Cooper, a survivor, did not say, as stated in the opinion, that he saw "plenty of ice" on Saturday. It was on the day of the accident that he saw "plenty of ice". His testimony as to ice before the day of the accident is that he saw "some" ice on Saturday and "a little" ice on Sunday. It was on the New York side. He

did not recall seeing any ice on the New Jersey side (R. 1138).

It will be observed from the foregoing analysis of the testimony that only three witnesses claimed to have seen any ice prior to Saturday. These witnesses were Kearney and the two policemen, all of whom proved entirely too much—*i. e.*, that the river was practically full of ice for a week before the accident.

In order to complete our analysis of the claimants' testimony, we will mention briefly the claimants' other witnesses not cited in the opinion of the District Court.

The only witness for the claimants who undertook to testify from a record that there was ice in the harbor prior to the day of the disaster, was Hill, who testified from a memorandum that he first encountered ice on December 14, around the southern end of Governor's Island. The next entry which he claimed to have with respect to ice was on the day of the accident (R. 901, 902). The ice, which he claims to have seen on the 14th, may have come from Greenville Flats (R. 893). As it appears from the testimony of another of claimants' witnesses that ice from the Greenville Flats never goes into the North River (R. 1344), this testimony is of no importance even if true. However, this witness was challenged to produce his official log and when he did so it was so palpably altered that the court itself immediately commented upon it (see Colloquy, R. 1084). Instead of admitting and explaining the fact that the entries as to ice had been interlined, the witness insisted that they were made at the same time as the other entries. This testimony was obviously false (see Petitioner's Exhibit 27, and Testimony of Osborn, the handwriting expert, R. 1076). The District Court evidently took this view and ignored the testimony of Hill, who is not referred to in

the opinion. The testimony is unimportant in any event, and we mention it only to show the complete collapse of the claimants' only attempt to produce any record of ice in the harbor prior to Saturday night.

The other witnesses for the claimants require very little discussion. Pray, Potter and Gray were employed on the pier at 129th Street, and testified in a general way that there had been considerable ice in the river prior to the day of the accident. These witnesses had no records and nothing to refresh their recollection, excepting that they had been approached by a man from the office of one of the claimants' counsel (R. 914) about a month before the trial (R. 915), and had then refreshed their recollection by talking with him and with each other. The extravagance of their testimony renders it worthless. It is quite inconsistent with all the claimants' other testimony, excepting that of Kearney and the two patrolmen.

O'Donnell, another fireman from the "Mitchell" gave no testimony inconsistent with the petitioner's contention. He saw ice at the New York Central float bridges early Sunday morning and he also saw ice at Fort Lee some time Sunday night (R. 1311-13). This is the ice which admittedly came down early Sunday morning. The witness was asked about another incident when he encountered ice in the slip, but he admitted frankly that he could not tell when this occurred (R. 1312-13).

Amster, a former employee who had been active in preparing the claimants' case for trial (R. 1178, 1204-5) testified in a general way to having seen ice before the 20th. Three survivors, Darco, Ludwig and Boots, testified in a general way to having seen ice as early as Saturday. None of them gave an earlier date.

In closing our discussion of claimants' testimony, we

will mention a number of additional witnesses called by the claimants, whose testimony supported petitioner's case. Among these are the police officers attached to the launch "Gypsy", who testified that they had no recollection of encountering ice prior to the day of the disaster (Ryan, R. 1047; Beyer, R. 1048; Tappan, R. 1136). In view of the fact that they are constantly navigating the harbor in a small launch, these men could scarcely fail to be impressed by the presence of ice in the North River.

The claimants also called Francis Mulhern, mate of the tug "Buffalo", who testified that he did not recall any ice in the river before the day of the accident (R. 1367).

The claimants also called Captain Gritmon, of the Cornell tug "Bavier", who testified that he was bringing a tow down the Hudson on the morning of the disaster, and ran out of the ice at 158th Street. Below that point he encountered no ice, although the ice was coming down behind him with the ebb tide (R. 1323).

Two of the survivors, Barker and Norgrove (called by the claimants) testified to having seen ice, just beginning, on the New York side on Sunday morning (R. 1090, 1091, 1109).

The claimant called another survivor, Frank Charles, who testified that he had made a number of trips during December, but did not recall having seen any ice prior to the day of the accident (R. 1305).

When the petitioner's testimony is considered, we submit that there can be no possible doubt as to when ice first appeared in the North River.

Petitioner's Testimony.

The petitioner produced two witnesses, United States Government employees, civil engineers, employed on the

U. S. S. "Illinois", naval training ship stationed at 97th Street and Hudson River. They were John Herben (R. 1688) and Henry Steinfatt (R. 1705). These witnesses testified that they lived as neighbors in New Jersey and had been accorded the courtesy of the use of the "Linseed King" as a means of conveyance from the New Jersey side of the river to 95th Street, which is immediately adjacent to their station. They had both been accustomed to travel on the "Linseed King" twice a day for several years before the accident. They usually took the boat leaving the plant at Edgewater at 7:20 every morning and returning leaving 95th Street at 5:15. They had travelled on the "Linseed King" twice each day during the week previous to the accident, including Saturday. Moreover, these men were in an excellent position from their station on the U. S. S. "Illinois" to observe conditions in the river and to have knowledge as to when ice appeared in the river; in fact, it was part of their duty to watch for ice, as they were in charge of Government property which had to be protected (R. 1707). Both of these men testified that they had not seen any ice in the river prior to the day of the accident, either while they were passengers on the "Linseed King" or while they were stationed on the U. S. S. "Illinois", or otherwise (Herben, R. 1690; Steinfatt, R. 1707).

Frank A. Chrisler, superintendent tug dispatcher for the New York Central Railroad Company, appeared and produced the original books of entry in which the tug dispatchers keep a record of the movements of all vessels at the terminal of the New York Central Railroad Company between 59th Street and 72nd Street on the Hudson River (R. 1713). This terminal is about a mile below 95th Street. In these records, kept in the regular course of the business, every four hours an entry is made

as to the weather, wind, temperature, and if there is floating ice in the vicinity of the slips this is also noted. Mr. Chrisler testified from his record that the first entry of any ice in the river for the month of December, 1926, was at 12 midnight on Saturday night (R. 1714). The entries for the days—December 19th and 20th—were read into the record (R. 1718-9) and it appeared that the ice noted at midnight had disappeared by 4 A. M. on the 19th and that the next ice noted was at 4 A. M. on December 2[illegible]. A special entry was inserted at 7 A. M. on the 2[illegible], indicating heavy ice in the vicinity of the slips, but by 8 A. M. this ice had disappeared (R. 1718) and no further ice was recorded until three days later, Thursday, December 23rd, at 4 A. M. (R. 1719). His testimony as to the keeping of the records was confirmed by R. R. Bogart, another dispatcher at the same terminal (R. 1726).

Louis Sayer, in charge of the floating equipment of the Pennsylvania Railroad Company, whose office is on the end of Pier D, Jersey City, across from the Battery (R. 1733), appeared and testified from his records that the first record of ice in the month of December, 1926, affecting his equipment which operates principally between the Battery and the New York Central Terminal at 68th Street, was on December 23rd, 1926 (R. 1733).

Captain Howard P. Fort of the Dalzell Towing Line, master of the tug "Fred B. Dalzell", who was in charge of the docking of the steamship "Tercero" at the petitioner's plant on the morning of Sunday, December 19th, testified as to this operation and said there was no ice in the river on that day (R. 1742), although there was some ice in the slips on the New York side of the river (R. 1742). The matter of ice was of considerable importance to Captain Fort in connection with this opera-

tion, for he was required to report to his employers if any ice was encountered, as it is the custom of his employers to double their towing charges when ice is encountered in the course of the operation (R. 1742). He also testified that there had not been any ice in the harbor prior to December 19th (R. 1742). His testimony was corroborated by the testimony of Captain Erickson, also a Dalzell tugboat captain, who assisted in the operation of docking the "Tercero" (R. 1747). Erickson testified that there was no ice in the river on December 19th and that none had been seen before that date (R. 1748-9).

Albert T. Schmidt, captain of the steamlighter "Kangaroo", owned by the Atlantic Lighterage Company, produced his logs for the entire month of December, 1926, and refreshed his recollection from the logs and testified that he had encountered no ice in the harbor prior to the date of the accident (R. 1751-2).

Thomas F. Quinn, captain of a Lehigh Valley tug, testified that he had occasion to proceed to 135th Street, Hudson River, on the afternoon of December 20th. He had heard that the "Linseed King" had been sunk in the ice and consequently was on the lookout for ice. He saw no ice either on the way to 135th Street nor on his way returning to the Lehigh Valley Terminal (R. 1757). He testified that there had been no ice previous to this that winter (R. 1757). His testimony from his records is persuasive and illustrates the vagaries of floating ice in the river. Although there had been heavy ice in the river in the morning at the time of the accident to the "Linseed King", it had disappeared during the afternoon and Captain Quinn found none on his trip to 135th Street and back. This corresponds with the record of the New York Central Railroad, which shows that there

was no ice recorded between 8 A. M. on December 20th and 4 A. M. on December 23rd. It also fits in with the testimony of Weitzman, the photographer who testified that the river was clear at 95th Street when the photographs of the "Linseed King" were made on the dock on the afternoon of December 22nd, 1926, two days after the accident (R. 1763), but whose photographs taken at Riverdale on the same day show considerable floating ice (R. 1763-4; Petitioner's Exhibits 20 and 21).

We also have the direct testimony of Captain Rohweder that *he* had not seen any ice in the river prior to December 20th. He said: "The first ice I saw was the 20th of December, on the morning of the accident" (R. 383).

Clayton, when asked by counsel for the claimants, asserted that he had seen no ice in the river prior to the accident, except some up off Fort Washington Point in the vicinity of Dyckman Street Ferry on the day before (R. 487).

Balz testified that he had not seen or heard of any ice in the river prior to December 20th (R. 502).

Stover and McHale testified to the same effect (R. 738, 1771), and testified that they were at the petitioner's plant on the afternoon of Sunday, December 19th, and observed conditions in the river from the roof of the pier, but saw no indication of any ice in the river (R. 728, 1772, 1783).

We submit that all the credible evidence in the case, including both that offered by the claimants and that offered by the petitioner, establishes beyond a peradventure of a doubt that there was no floating ice in the Hudson River in the vicinity of 96th Street, prior to the morning of the accident, except for a small amount which came down between midnight and 4 A. M. on December 19th and disappeared during the morning.